

THE STATE OF NEW HAMPSHIRE

GRAFTON COUNTY SS

SUPERIOR COURT

State of New Hampshire
Department of Environmental Services

v.

Thermal Dynamics Corporation

PETITION FOR CIVIL PENALTIES

NOW COMES the State of New Hampshire Department of Environmental Services (“DES”), by and through its counsel, the Office of the Attorney General (“State”), and petitions this Court for assessment of civil penalties against Thermal Dynamics Corporation (“TDC” or “Defendant”) as follows:

A. INTRODUCTION

1. This is an action for civil penalties under the authority of the New Hampshire Hazardous Waste Rules, promulgated pursuant to the New Hampshire Hazardous Waste Management Act and codified as RSA Chapter Ch. 147-A, against TDC for serious violations of New Hampshire's hazardous waste laws, rules and permits. The State alleges that TDC failed to properly manage hazardous waste at its facility located at 82 Benning Street, West Lebanon, NH. Among other violations, TDC failed to deliver waste to a facility authorized to handle hazardous material, conduct adequate hazardous waste determinations, and provide hazardous waste training to their employees. The State seeks civil penalties in connection with the release and threatened release of hazardous waste at numerous locations across the United States and Canada and for other violations of RSA Ch. 147-A and rules adopted thereunder.

B. PARTIES

2. The petitioner, DES with principal offices at 29 Hazen Drive, Concord, New Hampshire 03302, is the state agency responsible for the administration and enforcement of RSA Ch. 147-A and adopted rules, for the purpose of protecting human health and preserving the natural environment.

3. The Defendant is a foreign corporation that registered with the New Hampshire Secretary of State's Office on November 14, 1977. TDC's New Hampshire facility has a principle office and mailing address of 82 Benning Street, West Lebanon, New Hampshire 03784-3403. TDC's parent company, Thermadyne Corporation, headquarters are located at 16052 Swingley Ridge Road, Suite 300, St. Louis, Missouri 63017.

C. JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action pursuant to RSA 147-A:4 (2006) and RSA 147-A:17 (2006). Venue is proper in this county because the facility in question is located in West Lebanon, New Hampshire.

D. FACTUAL BACKGROUND

5. Since 1968, TDC has operated a facility in West Lebanon, NH ("the Facility") that manufactures hand held and automated plasma-cutting systems utilized for cutting ferrous and non-ferrous metals.

6. TDC's facility occupies four buildings with approximately 121,478 square feet of enclosed space. Defendant rents the facility from Benning Street, LLC with a mailing address of P.O. Box 646, Worcester, MA 01613. The deed is recorded at the Grafton County Registry at book 2948, page 0052.

7. TDC originally notified the United States Environmental Protection Agency (“EPA”) of its activities on July 28, 1980. EPA Identification Number NHD001080951 was assigned to TDC’s site.

8. On June 24, 2005, DES personnel performed a compliance inspection of TDC’s facility. Based upon the inspection, DES discovered seventy-two violations of RSA Ch. 147-A and the New Hampshire Hazardous Waste Rules. (*See attached Hazardous Waste Generator Inspection Report, incorporated by reference herein.*)

9. As a result of the compliance inspection, on August 10, 2005, DES issued Letter of Deficiency No. WMD 05-021 (“LOD”), which identified fifteen deficiencies of the Hazardous Waste Rules at TDC’s facility. (*See attached LOD No. WMD 05-021, incorporated by reference herein.*)

10. On August 20, 2005, TDC submitted to DES an analysis of the waste collected in a 1,100-gallon tank prior to entering into a wastewater evaporator and a “waste oil” analysis generated from the evaporation process. The total lead concentration in the 1,100-gallon collection tank waste sample was 15 mg/L. The total lead in the “waste oil” sample was 33 mg/kg.

11. On September 7, 2005, TDC submitted test results for the “sludge” generated from the wastewater evaporator, which indicated a total lead level of 25 mg/L. Env-Wm 403.06 specifies that a waste is hazardous if it contains lead at a concentration of greater than or equal to 5 mg/L.

12. Based on the analysis of 15 mg/L of lead from the waste in the 1,100-gallon tank feeding the evaporator, and an analysis of 25 mg/L of lead in the sludge generated from the evaporator, DES determined that Env-Wm 351.02(f) requires a limited wastewater evaporator unit permit.

13. On September 19, 2005, DES personnel met with TDC to discuss the application for a

limited permit. DES suggested that TDC conduct an additional hazardous waste determination using the Toxic Characteristic Leaching Procedure (“TCLP”) on a sample of evaporator sludge. During this meeting, TDC also clarified the waste streams that enter into the 1,100-gallon tank, which feeds into TDC’s wastewater evaporator. The waste stream included: acid / water mix from brazing area; rinse waters from CNC area; wash waters from the floors; condensate from the compressor; and occasionally rinse water from the washing area.

14. On October 3, 2005, TDC submitted a sample TCLP analysis for the evaporator sludge waste.

- a. The analysis indicated lead at 100 mg/L for the sample of waste removed during the evaporation process and 47 mg/L for the “oil residue” left after evaporating the water.
- b. The reported total concentration of mercury in the evaporator sludge indicated a level of .78 mg/L for the sample of waste removed during the evaporation process and .41 mg/L for the “oil residue” left after evaporating the water. Env-Wm 403.06 specifies that a waste is hazardous if it contains mercury at a concentration of greater than or equal to 0.2 mg/L.

15. On October 14, 2005, TDC submitted an application for a limited permit for a wastewater evaporation unit.

16. On November 10, 2005, DES issued a Notice of Findings (“NOF”) to TDC, which informed the Defendant that the evaporator sludge may no longer be disposed of as a state regulated waste NH01 and must be handled pursuant to the requirements of the Hazardous Waste Rules. Also, based upon the TCLP hazardous waste determination, DES identified an additional hazardous waste compliance deficiency, not identified in the LOD, for the failure to use the

correct EPA and/or state waste number on the hazardous waste manifests. (*See* attached NOF, dated November 10, 2005, included herein by reference).

17. In response to DES inquiries from the NOF, on December 12, 2005, TDC submitted that they have disposed of the evaporator sludge as a NH01 state regulated waste for an estimated 12 years and 8 months. Additionally, TDC disclosed that Laidlaw Environmental Services in North Andover, Massachusetts and Jones Environmental Services in Lowell, Massachusetts, disposed of the evaporator sludge.

18. On January 6, 2006, DES issued a second NOF to TDC. This NOF informed TDC that DES identified an additional hazardous waste compliance deficiency not identified in the LOD. The additional compliance deficiency was the failure to deliver hazardous waste to a facility authorized under the destination's states rules to handle the hazardous waste. (*See* attached NOF, dated January 6, 2006, included herein by reference).

19. In regard to the application for the limited evaporation permit, on February 23, 2006, TDC submitted additional analytical data for the influent wastewater and effluent sludge from the wastewater evaporator. The concentration of lead from the 1,100-gallon tank sample indicated a lead level of 13 mg/L. The evaporator sludge results indicated 21 mg/L of lead and 0.97 mg/L of mercury.

20. On April 19, 2006, counsel for TDC submitted a separate issue of non-compliance with RSA 147-A. TDC analyzed an additional oily solid waste stream, which was determined to be hazardous for lead. TDC estimated that 235 pounds of hazardous oily absorbent waste had been generated per month over the past year. This hazardous waste was transported to the BFI Carbon Limestone Landfill in Lowellville, Ohio. (*See* attached letter, dated April 19, 2006, incorporated herein by reference).

21. On May 2, 2006, counsel for TDC submitted a copy of a letter they sent to the EPA in Ohio. This letter provided information that in 2000, 2001 and 2002, evaporator sludge that was shipped to the BFI Carbon Limestone facility may have been hazardous for lead and mercury. (See attached letter, dated May 2, 2006, incorporated by reference herein).

22. On July 12, 2006, counsel for TDC submitted a letter providing additional information that analysis was done on disposable paper wipes used by TDC in their manufacturing process. Based on analytical results it was determined that the wipes contained acetone, xylene, and ethyl benzene and were hazardous. TDC estimates that it generated 40 pounds of wipes per year and that the wipes were disposed of in the regular trash, which is sent to a landfill in West Lebanon, New Hampshire. (See attached letter, dated July 12, 2006, incorporated by reference herein).

23. On August 30, 2006, DES issued a third NOF. This NOF informed TDC that DES identified an additional hazardous waste compliance deficiency not identified in the LOD. The additional compliance deficiency was the failure to deliver hazardous waste to a facility authorized under the destination's states rules to handle the hazardous waste. (See attached NOF, dated August 20, 2006, incorporated by reference herein).

24. On December 5, 2007, DES issued a Letter of Compliance stating that TDC had corrected the deficiencies identified in the Letter of Deficiency No. WMD 05-021.

COUNT I
Failure to Obtain a Permit

25. The State realleges and incorporates by reference the allegations contained in paragraphs 1 through 24 herein.

26. RSA 147-A:4 and the NH Hazardous Waste Rule, Wm 351.02(f), require that operators of generator facilities, which operate a wastewater treatment unit—including an evaporation unit—must, in accordance with Env-Wm 353.04, obtain a limited permit.

27. TDC is a generator facility because their manufacturing process creates waste with concentrations of lead and mercury that are above the regulated limit. Env-Wm 403.06 specifies that waste is a characteristic hazardous waste if it contains lead at a concentration of greater than or equal to 5 mg/L. Env-Wm 403.06 specifies that waste is a characteristic hazardous waste if it contains mercury at a concentration of greater than or equal to 0.2 mg/L. Thus, TDC is a generator facility because the sample analysis of evaporator sludge submitted by TDC indicated that the concentration of lead was 100 mg/L and mercury was .78 mg/L.

28. TDC operates a wastewater treatment unit because, according to TDC, various rinse and wash liquids and other wastewaters are stored into a 1,100-gallon tank and then pumped into a unit, which evaporates the waste mixture. As a result of the evaporation, hazardous waste sludge is generated.

29. TDC operated for 14 years without obtaining a limited permit for the operation of a wastewater evaporation unit, in violation of Env-Wm 353.04.

30. Under RSA 147-A:17, TDC is subject to civil forfeiture to the state of up to \$50,000 for each violation, and for each day of a continuing violation.

COUNT II
Failure to Conduct Adequate Hazardous Waste Determinations

31. The state realleges and incorporates by reference the allegations contained in paragraphs 1 through 30 herein.

32. Under Env-Wm 502.01, all generators of waste are required to determine if that waste is hazardous.

33. Prior to the DES compliance inspection, TDC failed to determine whether the evaporator sludge, which was the product of a combined waste stream held in a 1,100-gallon tank and then pumped into the evaporator, was hazardous. Subsequently, TDC determined that the evaporator

sludge was hazardous because the waste contained levels of lead and mercury that fell above the regulated limit.

34. TDC operated for 14 years in violation of Env-Wm 502.01 for failing to conduct adequate hazardous waste determinations. Thus, during that time period, TDC's hazardous evaporator sludge was improperly disposed of as NH01 state regulated waste.

35. Under RSA 147-A:17, TDC is subject to civil forfeiture to the state of up to \$50,000 for each violation, and for each day of a continuing violation.

COUNT III **Storage Violations**

36. The state realleges and incorporates by reference the allegations contained in paragraphs 1 through 35 herein.

37. Under Env-Wm 507.01, all hazardous wastes shall be placed in containers that are in good condition and remain closed at all times except to add or remove waste.

38. During the DES compliance inspection, DES found one 55-gallon plastic drum containing hazardous waste that was not in good condition because, due to pressure from within, it was bulging. Additionally, during the DES compliance inspection, DES found six 55-gallon containers of hazardous waste that were not closed.

39. TDC failed to comply with the hazardous waste storage requirements set forth in paragraph 37, in violation of Env-Wm 507.01.

40. Under RSA 147-A:17, TDC is subject to civil forfeiture to the state of up to \$50,000 for each violation, and for each day of a continuing violation.

COUNT IV **Storage Labeling Violations**

41. The state realleges and incorporates by reference the allegations contained in paragraphs

1 through 40 herein.

42. Under Env-Wm 507.03, containers used for the storage of hazardous waste shall be clearly labeled or marked with the beginning accumulation date; the words “hazardous waste; words that identify the contents of the container; and, the applicable EPA or state waste number.

43. During the DES inspection, DES found two containers of hazardous waste not labeled with the beginning accumulation date. Additionally, DES found three 55-gallon containers of hazardous waste lacking the words “hazardous waste,” a description of the contents of the container and the EPA or state waste number.

44. TDC failed to comply with the hazardous waste labeling requirements set forth in paragraph 42, in violation of Env-Wm 507.03.

45. Under RSA 147-A:17, TDC is subject to civil forfeiture to the state of up to \$50,000 for each violation, and for each day of a continuing violation.

COUNT V **General Inspection Violations**

46. The state realleges and incorporates by reference the allegations contained in paragraphs 1 through 45 herein.

47. Under 509.02(a)(1), full quantity generators must comply with 40 CFR 265.15. 40 CFR 265.15 states that the operator must develop and follow a written inspection schedule and that the operator must record inspections in an inspection log or summary.

48. TDC failed to document inspections of six hazardous waste storage areas for 30 out of the 156 required weekly inspections in the six months prior to the DES inspection. Additionally, inspections of the storage area in Building 5A had never been documented for a three-year time period prior to the inspection.

49. TDC failed to comply with the general inspection requirements set forth in paragraph 47,

in violation of Env-Wm 509.02(a)(1).

50. Under RSA 147-A:17, TDC is subject to civil forfeiture to the state of up to \$50,000 for each violation, and for each day of a continuing violation.

COUNT VI
Personnel Training Violations

51. The state realleges and incorporates by reference the allegations contained in paragraphs 1 through 50 herein.

52. Under Env-Wm 509.02(a)(2), full quantity generators must comply with 40 CFR 265.16. 40 CFR 265.16(a)(1) states that facility personnel must successfully complete a program of classroom instruction or on-the-job training that teaches them to perform their duties in a way that ensures the facility's compliance. In addition, 40 CFR 265.16(c) states that facility personnel must take part in an annual review of the initial training required in 40 CFR 265.16(a)(1).

53. TDC failed to maintain a personnel training program and provide hazardous waste training for the following employees with hazardous waste management duties:

- a. Greg Balch, Alternative Emergency Coordinator: No initial training and four years of annual training.
- b. Tony LaFramboise, Alternative Emergency Coordinator: Five years of annual training.
- c. Bill Wolfel, Alternate Emergency Coordinator: No initial training.
- d. Paul Page, Alternate Emergency Coordinator: No initial training.
- e. David Wyzkiewicz, No initial training.

54. TDC failed to comply with the personnel training requirements set forth in paragraph 52, in violation of Env-Wm 509.02(a)(2).

55. Under RSA 147-A:17, TDC is subject to civil forfeiture to the state of up to \$50,000 for each violation, and for each day of a continuing violation.

COUNT VII
Preparedness and Prevention Violations

56. The state realleges and incorporates by reference the allegations contained in paragraphs 1 through 55 herein.

57. Under Env-Wm 509.02(a)(4), full quantity generators must comply with 40 CFR 265, Subpart C. 40 CFR 265.35, Subpart C states that the operator must maintain space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination equipment to any area of facility operation in an emergency.

58. TDC failed to maintain adequate aisle space for twenty-three containers of hazardous waste stored in Building 5A.

59. Thus, TDC failed to comply with the preparedness and prevention requirements set forth in paragraph 57, in violation of Env-Wm 509.02(a)(4).

60. Under RSA 147-A:17, TDC is subject to civil forfeiture to the state of up to \$50,000 for each violation, and for each day of a continuing violation.

COUNT VIII
Contingency Plan Violations

61. The state realleges and incorporates by reference the allegations contained in paragraphs 1 through 60 herein.

62. Under Env-Wm 509.02(a)(5), full quantity generators must comply with 40 CFR 265, Subpart D. 40 CFR 265.53, Subpart D states that a copy of the contingency plan must be maintained at the facility. Additionally, 40 CFR 265.52(a)-(f) states the required content of a contingency plan.

63. TDC failed to have a complete contingency plan on-site. TDC's contingency plan was also deficient because the plan did not include:

- a. A physical description and a brief outline of the capabilities of emergency equipment;
- b. Instructions to notify either the local fire chief or the National Response Center; and,
- c. Copies of the plan had not been submitted to the local authorities.

64. Thus, TDC failed to comply with the contingency plan requirements set forth in paragraph 62, in violation of Env-Wm 509.02(a)(5).

65. Under RSA 147-A:17, TDC is subject to civil forfeiture to the state of up to \$50,000 for each violation, and for each day of a continuing violation.

COUNT IX **Emergency Posting Violations**

66. The state realleges and incorporates by reference the allegations contained in paragraphs 1 through 65 herein.

67. Under Env-Wm 509.02(b), full quantity generators must post a list of the steps to take if an emergency occurs and emergency numbers at the nearest telephone to each hazardous waste storage area.

68. TDC failed to post emergency steps or numbers at the nearest telephone in five hazardous waste storage areas.

69. Thus, TDC failed to comply with the emergency posting requirements set forth in paragraph 67, in violation of Env-Wm 509.02(b).

70. Under RSA 147-A:17, TDC is subject to civil forfeiture to the state of up to \$50,000 for each violation, and for each day of a continuing violation.

COUNT X **Security Violations**

71. The state realleges and incorporates by reference the allegations contained in paragraphs 1 through 70 herein.

72. Under Env-Wm 509.02(c)(2), full quantity generators are required to provide a means to control entry, at all times, through gates or other entrances to the hazardous waste storage area such as an attendant, television monitor, locked entrance or controlled roadway access to the area.

73. TDC failed to provide security measures because, during the DES inspection, the Building 5A Outdoor Storage Area Gate was unlocked.

74. Thus, TDC failed to comply with the security requirements set forth in paragraph 72, in violation of Env-Wm 509.02(c)(2).

75. Under RSA 147-A:17, TDC is subject to civil forfeiture to the state of up to \$50,000 for each violation, and for each day of a continuing violation.

COUNT XI **Manifest Violations**

76. The state realleges and incorporates by reference the allegations contained in paragraphs 1 through 75 herein.

77. Under Env-Wm 510.03(a), the manifest shall contain all of the information required in the Appendix to 40 CFR Part 262. The Appendix to 40 CFR Part 262, Item 9(b) requires that generators must list on the hazardous waste manifest the U.S. DOT Proper Shipping Name, Hazard Class or Division Identification Number (UN/NA) and Packing Group for each waste as identified in 49 CFR 172, and include technical name(s) and reportable quantity references, if applicable.

78. At the time of inspection, TDC failed to use the correct EPA and/or State waste number, specifically NH02 – corrosive solids, for oil related waste transported on the following hazardous waste manifests:

- a. MAQ638273;

- b. MAQ640922;
- c. MAQ638136;
- d. MAM178469;
- e. MAM176245; and,
- f. MAM163916.

79. Thus, TDC failed to comply with hazardous waste manifest requirements set forth in paragraph 77, in violation of Env-Wm 510.03(a).

80. Under RSA 147-A:17, TDC is subject to civil forfeiture to the state of up to \$50,000 for each violation, and for each day of a continuing violation.

COUNT XII **Delivery Violations**

81. The state realleges and incorporates by reference the allegations contained in paragraphs 1 through 80 herein.

82. Under Env-Wm 511.01(b), a generator shall deliver hazardous waste to a facility authorized under the destination state's rules to handle the hazardous waste.

83. In 2001 and 2002, the TDC's evaporator sludge waste was shipped to Jones Environmental in Lowell, Massachusetts. Jones then shipped the hazardous waste to the BFI Carbon Limestone Landfill in Lowellville, Ohio. This Ohio landfill is a subtitle D and is not permitted to accept hazardous waste.

84. Since 1992, TDC contracted with many other waste vendors to dispose of hazardous waste sludge. These vendors ultimately sent the hazardous waste to seventeen facilities throughout the United States and Canada. The vendors and the facilities had no knowledge that TDC's sludge was hazardous for lead and mercury because it was not identified on the hazardous waste manifest.

85. Thus, TDC failed to comply with hazardous waste delivery requirements set forth in

paragraph 82, in violation of Env-Wm 511.01(b).

86. Under RSA 147-A:17, TDC is subject to civil forfeiture to the state of up to \$50,000 for each violation, and for each day of a continuing violation.

COUNT XIII
Universal Waste Management Violations

87. The state realleges and incorporates by reference the allegations contained in paragraphs 1 through 86 herein.

88. Under 1102.03, a universal waste handler shall manage universal waste batteries.

89. Under Env-Wm 1102.03(c)(1), when containment of universal waste batteries is required by the rules, the containers shall be, “closed, except when universal waste is being added to or removed from the container.”

90. During the compliance inspection, DES discovered that TDC failed to close one container of universal waste batteries.

91. Thus, TDC failed to comply with universal waste management requirements set forth in paragraphs 88 and 89, in violation of Env-Wm 1102.03(c)(1).

92. Under RSA 147-A:17, TDC is subject to civil forfeiture to the state of up to \$50,000 for each violation, and for each day of a continuing violation.

REQUESTS FOR RELIEF

WHEREFORE, the State respectfully requests that this Court:

- A. Assess a civil forfeiture in the amount of \$50,000 per day for each violation of the hazardous waste statutes, rules, permits and orders, as provided under RSA 147-A:17(2006);
- B. Grant such other and further relief as this Court may deem just and equitable.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
KELLY A. AYOTTE
ATTORNEY GENERAL

Dated: 3/24/08

By: /s/: Maureen D. Smith
Maureen D. Smith
Senior Assistant Attorney General
Environmental Protection Bureau
Attorney General's Office
33 Capitol Street
Concord, New Hampshire 03301-6397